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TAN SWEE TIONG

v.

KHOR CHIN HAU

b

HIGH COURT MALAYA, ALOR SETAR

KN SEGARA J

[CIVIL APPEAL NO: 12-11-1998]

17 MARCH 1999

c

DAMAGES: *Quantum - Appeal against quantum - Damages for fractures considered separately from that of pain, suffering and loss of amenities - Whether proper - Special damages agreed to by both parties in sessions court - Whether court could interfere with amount awarded - Multiplier of 16 1/2 years' purchase - Whether appropriate multiplier - Whether damages for partial loss of earnings for a period of 16 years and for partial nursing care justified - Civil Law Act 1956, s. 28A(2)(d)(i)*

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CIVIL LAW ACT: *Damages - Loss of future earnings - Appropriate multiplier - Whether a fixed multiplier of 16 year's purchase as provided by s. 28A(2)(d)(i) of Act - Whether discretion of court to select appropriate multiplier taken away by Act*

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CIVIL LAW ACT: *Damages - Pre-trial and post-trial loss of earnings - Whether there is a distinction with amendment to Act - Civil Law Act 1956, s. 28A(2)(c), (d)*

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This was an appeal by the appellant/defendant against the award of the sessions judge on the quantum of damages in respect of a personal injuries claim by the respondent/plaintiff arising from an accident. The plaintiff was 28 years of age at the time of the accident. The sessions judge had found liability at 30:70 in favour of the plaintiff.

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The defendant raised four issues in this appeal: (1) that the sessions judge should not have awarded one sum for fractures and another for pain, suffering and loss of amenities; (2) that there is no distinction between pre-trial and post-trial loss of earnings after the amendment to the Civil Law Act 1956 ('CLA') and the multiplier of 16 1/2 years as applied by the sessions judge exceeded the statutory maximum of 16 years as provided by s. 28A(2)(d)(i)

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CLA; (3) that the circumstances of the injury did not warrant the award of partial loss of earnings for a period of 16 years; and (4) that there ought to be no award for partial nursing care at RM200 per month for ten months.

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Held:

- [1]** It was incorrect for the learned sessions judge to award one sum for the fractures and another for the pain and suffering and loss of amenities. Therefore, the appeal on that item of general damages should be allowed. Bearing in mind the degree of pain and suffering and the authorities submitted by both the parties herein, the award of RM35,000 was set aside and substituted with the sum of RM28,000. (p 489 d-f) **a**
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- [2]** Section 28A(2)(c) and (d) of the CLA makes no distinction between pre-trial and post-trial loss of earnings. The sum of RM7200 was special damages claimed by the plaintiff and agreed to by the defendant. As such, that amount did not justify any interference by the court. The defendant should have objected to that claim at the very outset itself before agreeing to it. The court could not lump the special damages claim to that of general damages under s. 28A(2)(d)(i) of the Act. (pp 489 g-i & 490 a) **c**
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- [3]** The case of *Chan Chin Min & Anor v. Lim Yok Eng* was distinguishable. That was a case of a dependency claim by the parent of an unmarried son, pursuant to s. 7(3)(iv)(d) CLA. In fixing the multiplier for the calculation of the loss of earnings, s. 7(3)(iv)(d) is almost identical to s. 28A(2)(d)(i) and (ii) CLA, the difference being that s. 7 deals with compensation in fatal accident claims. (p 490 e) **e**
- [3a]** The court preferred the dissenting view of *Chan Chin Min & Anor v. Lim Yok Eng*, ie, that with a fixed multiplier of 16 years' purchase specified in the Act, the Act intended to take away the discretion of the court to select the appropriate multiplier in assessing the loss of future earnings or earning capacity. Nevertheless, the defendant had not brought before the court or highlighted any possible applicable contingency to the plaintiff to persuade the court that it ought to exercise the discretion, if any, to reduce the multiplier in deference to the majority decision in the said case, by analogy, as being applicable even to a claim for loss of future earnings under s. 28A(2)(d)(i) or (ii) CLA. (p 490 f-i) **f**
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- [3b]** There was no doubt that the injuries suffered by the plaintiff had incapacitated him. In assessing the plaintiff's earning capacity, the court must assess the plaintiff's capacity to compete in the open market. Clearly, the plaintiff could do a sedentary job and as he had studied up to SPM level, he ought to be able to secure a job as a clerk. Thus, the court would assess his loss of earning capacity at RM86,400 (RM450 x 12 x 16). (p 492 a-b) **h**
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- a* [4] The learned judge in awarding partial nursing care at RM200 for a period of ten months, relied on the evidence of SB1. From the evidence of SB1, there was nothing to suggest that the plaintiff needed nursing care. That the plaintiff would require help in preparing his food, etc, was not nursing care but domestic help. Therefore, that award should be set aside. (p 492 d)
- b*

[Appeal allowed in part with costs to defendant.]

Case(s) referred to:

Chan Chin Min & Anor v. Lim Yok Eng [1994] 3 CLJ 687 (**dist**)

c **Legislation referred to:**

Civil Law Act 1956, ss. 7(3)(iv)(d), 28A(2)(c), (d)(i), (ii)

For the appellant/defendant - VK Dasaratharaj Pillay; M/s VP Nathan & Partners

For the respondent/plaintiff - Teresita Antoinette; M/s NM Tiong & Co

- d* *Reported by Usha Thiagarajah*

JUDGMENT

KN Segara J:

- e* This is an appeal from the decision of the learned sessions court judge, Alor Setar, in respect of a personal injuries claim arising from an accident which occurred on 16 November 1993. The learned sessions court judge found liability at 30:70 in favour of the plaintiff and made an award for general and special damages on 16 February 1998.

- f* The defendant, dissatisfied with this decision, has appealed only against the award on the quantum of damages. There was an application before me by the plaintiff for leave to serve a notice of cross-appeal on the defendant but this was dismissed on 14 December 1998.

- g* The plaintiff was 28 years old at the time of the accident and suffered the following injuries:

1. Compound comminuted fracture of the distal shaft of the tibia and fibula with deficient cortex on the anterior tibial shaft.
2. Suddecks Atrophy of the left foot.
- h* 3. Shortening of 1cm in the left limb.

There are four main issues raised by the defendant:

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- 1) that there cannot be a separation between the awards for the fractures and its resulting pain and suffering and loss of amenities; *a*
- 2) that there is no distinction between pre-trial loss and post-trial loss after the amendment to the Civil Law Act 1956 (CLA 56) (s. 28A) and the multiplier of 16 1/2 years exceeds the statutory maximum of 16 years as provided by s. 28A(2)(d)(i) of the CLA 56; *b*
- 3) that the circumstances of the injury did not warrant the award of partial loss of earnings for a period of 16 years; and
- 4) that there ought to be no award for partial nursing care at RM200 per month for ten months. *c*

1st Issue – Can There Be A Separation Between The Awards For The Fractures And Resulting Pain And Suffering And Loss Of Amenities

There is no doubt that the approach of the courts in assessing damages for personal injury cases is to make a single award for the injury, pain and suffering resulting from the injury, and for the loss of amenities. I see no reason to change the time honoured practice. *d*

Although the plaintiff's counsel has brought to the court's attention that the plaintiff had to undergo three operations, suffered surgical scars and deficiencies of density at the fracture union, and may have to undergo further surgery, these only underline the severity of the injury itself, and the extensive pain and suffering. Nevertheless, it is incorrect for the learned sessions court judge to award one sum for the fractures and another for the pain and suffering and loss of amenities. The appeal on this item of general damages is allowed. Bearing in mind the degree of pain and suffering and the authorities submitted by both counsels I set aside the award of RM35,000 and substitute the sum of RM28,000. *e*

2nd Issue – Is There A Distinction Between Pre-Trial Loss And Post-Trial Loss Of Earnings After The Amendments And Has The Sessions Court Judge Exceeded The Statutory Maximum Of 16 Years *g*

There is no doubt that s. 28A(2)(c) and (d) of the CLA 56 makes no distinction between pre-trial and post-trial loss of earnings. The plaintiff had, at p. 15 of the Rekod Rayuan, claimed the sum of RM7,200 as "Butir-butir Kerugian Khas Plaintiff" ie, special damages. This sum has been agreed to by the defendant as stated by the learned sessions court judge in the Alasan Penghakiman (p. 94) of the Rekod Rayuan, and I quote "peguam defendan telah menyetujui plaintiff dibayar RM1,200 satu bulan selama enam bulan di kira dari tarikh kemalangan" (see also defendant's written submission at p. 113 of the Rekod Rayuan). This amount, being agreed special damages between the parties, does not justify any interference by the court. *h*

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a The defendant submits that the sessions court judge has enlarged the provisions of s. 28A(2)(d)(i) of CLA 56. If this is his contention, then, at the very outset itself, counsel ought to have objected to this claim and not agreed to the said sum claimed as special damages. The court cannot lump the special damages claim to that of the general damages under s. 28A(2)(d)(i).

b **3rd Issue – Did The Circumstances Of The Injury Warrant The Award Of Partial Loss Of Earnings For A Period Of 16 Years**

As regards the question of loss of future earnings or earning capacity, there is no doubt that injuries suffered by the plaintiff has incapacitated him. He cannot stand for long and he cannot do heavy work as his current employment in his father's company involved. The defendant has urged the court to look into the fact that the plaintiff will not be out of job, his position in the father's company has not been filled, thus his loss of future earnings can only be partial at RM300. The defendant's counsel urges the court not to adopt the full multiplier as stipulated in s. 28(2)(d)(i) CLA 56 as the discretion has not been curbed. The court's attention was drawn to the case of *Chan Chin Min & Anor. v. Lim Yok Eng* [1994] 3 CLJ 687.

e This present appeal before me is clearly distinguishable. *Chan Chin Min's* case was a dependency claim by the parent of an unmarried son, pursuant to s. 7(3)(iv)(d) of the CLA 56. In fixing the multiplier for the calculation of the loss of earnings, s. 7(3)(iv)(d) is almost identical to s. 28A(2)(d)(i), (ii) of CLA 56 – the difference is that s. 7 deals with compensation in fatal accident claims.

f Counsel for the defendant has urged the court to exercise the discretion and reduce the multiplier as the majority decision of the Supreme Court in *Chan Chin Min's* case held that s. 7(3)(iv)(d) does not curb the common law discretion to reduce the multiplier in appropriate cases. However, I agree with his lordship Edgar Joseph Jr. SCJ, that the provision is manifestly clear and, that the Act intended to take away the discretion to select the appropriate multiplier in assessing the loss of future earnings or earning capacity. I would entirely agree with his lordship in saying that if the court can, in an appropriate case, reduce the multiplier, then, it conversely can “increase” the multiplier beyond 16 years! This certainly was not the intent of Parliament in enacting the said provisions. Nevertheless, in this appeal before me, the defendant has not brought before the court or highlighted any possible applicable contingency to the plaintiff, for consideration to persuade the court that it ought to exercise the discretion, if any, to reduce the multiplier, in deference to the majority decision in *Chan Chin Min's* case, by analogy, as being applicable even to a claim for loss of future earnings under s. 28A(2)(d)(i) or (ii) CLA 56.

i Perhaps, it will not be out of place here for me to quote from the dissenting judgment of Edgar Joseph Jr. SCJ, so much as is relevant:

To my mind, it is manifestly clear, that in enacting the detailed provisions of proviso (d) to s. 7(3)(iv), Parliament had intended to take away the discretion of the court to select the appropriate multiplier, in assessing loss of earnings of a deceased person in respect of a period after his death, for purposes of a claim for loss of support under s. 7(1).

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If counsel for the Defendants were correct in his contentions, regarding this part of the case, then the Court also, in an appropriate case, in the exercise of its discretion:

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(1) in the case of a deceased person of the age of 30 years and below, increase the multiplier beyond 16 years; or

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(2) in the case of a deceased person of the age range extended between 31 years and 54 years, ignore the statutory formula provided and select an appropriate multiplier; or

(3) in the case of a deceased person of the age of 55 years and above, select an appropriate multiplier, when assessing loss of earnings in respect of the period after the death, although proviso (d) impliedly debars the court altogether from making any such award.

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In other words, the effect of counsel for the defendant's submissions, if upheld, would mean that the court could, in any of the above cases, rewrite the statute, or brush aside explicit statutory provisions and select, in the exercise of its discretion, a suitable multiplier. This proposition is, in my view, quite untenable, and has only to be stated to be rejected, bearing in mind that when a question of statutory interpretation arises, the duty of the court is simply to give effect to the will of Parliament as expressed in the law. "The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation". (See *West Coast Hotel Co. v. Parrish* [1937] 300 US 379 at p. 404 per Sutherland J) Similarly, Cardozo J said in *Sunprinting and Publishing Association v. Remington Paper and Power Co. Inc.* [1923] 130 NE 470 at 471:

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We are not at liberty to exercise while professing to construe.

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I recognise that the application of a fixed multiplier of 16 years in the present case, may be somewhat hard on the defendant tortfeasors. However, where the enactment of the legislature in clear and unequivocal language is capable of only one meaning, it must be enforced however harsh the result may be. (See *Cartledge v. E Jopling & Sons Ltd.* [1963] AC 758; [1963] 1 All ER 341; [1963] 2 WLR 210). Nor, for that matter, taking into consideration notions as to what is just and expedient. (*Gwynne v. Burnell* [1840] 7 CL & Fin 572 per Goleridge J.) ...

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(See *Chan Chin Min v. Lim Yok Eng* [1994] 3 CLJ 687 at pp. 699 & 700).

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- a* There is clear and uncontroverted evidence that the plaintiff, as a result of the injuries, is unable to stand for long nor do heavy work as envisaged in the present employment. Counsel for the defendant has gone to great lengths to point out that the plaintiff has not lost his job and his position in his father's company has not been filled. In assessing the plaintiff's earning capacity the court must assess the plaintiff's capacity to compete in the open market.
- b* Clearly, the plaintiff can do a sedentary job and as he has studied up to SPM level (but does not possess an SPM certificate) he ought to be able to secure a job as a clerk and earn about RM700 to RM750 a month. I would thus assess his loss of earning capacity as RM86,400 (RM450 x 12 x 16).

c **4th Issue – Should There Be An Award For Partial Nursing Care**

- The defendant is not objecting to the award of full nursing care for the period of six months at RM500 but, is in fact objecting to the partial nursing care at RM200 for a period of ten months. The learned sessions court judge, in
- d* awarding this item, relied on the evidence of Dr. Sarwan Singh (SB1). From the evidence of SB1 there is nothing to suggest that the plaintiff needed nursing care. SB1 suggested that the plaintiff will require help in preparing his food etc. This is not nursing care but domestic help. I agree with the defendant and set aside this award for partial loss of nursing care.
- e* In the above circumstances, the appeal is allowed in part, with costs to the defendant. The usual interest awarded by the sessions court judge will remain. Deposit to be refunded to the defendant.

Order accordingly.

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